

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:16-cv-03088-ELR
)	
STATE OF GEORGIA,)	
)	
Defendant.)	
)	

SECOND JOINT STATUS REPORT

NOW COME Plaintiff United States of America (“United States”) and Defendant State of Georgia (“State”), pursuant to the Court’s September 14, 2021 Order [Doc. 117] (the “September 14 Order”), and hereby file the second joint quarterly status report.

This report describes the parties’ progress towards completing fact discovery by the Court-ordered September 12, 2022 deadline and identifies issues that may affect the parties’ ability to meet that deadline. This is the second quarterly status report under the September 14 Order.¹

¹ The parties filed their first joint quarterly status report pursuant to the September 14 Order on December 10, 2021. [Doc. 126].

Below, the parties describe their respective discovery activities since the first joint status report.

A. Steps Taken by the United States

The United States has diligently continued to seek and respond to discovery with the goal of meeting the Court's fact discovery deadline. The steps the United States has taken, as well as the issues currently of concern to it, are described below.

1. Site Inspections

Since July 2021, the United States has sought the voluntary cooperation of the State and regional GNETS programs to afford the United States' experts the opportunity to tour GNETS program sites and conduct classroom observations. That discovery is plainly relevant given that the lawsuit alleges unnecessary segregation of students in the GNETS Program. The State, which seeks to avoid responsibility by claiming that the programs are under local control, has declined to assist the United States in coordinating these visits. The United States maintains that the GNETS Program is operated by the State, which exercises direct and substantial control over the Program, and could coordinate site visits via the State's GNETS Program Manager and GNETS Program Specialist, both employed by the Georgia Department of Education.

While the United States succeeded in scheduling and conducting voluntary site visits to 15 facilities in November and December 2021, the United States has met substantial road blocks in organizing some other site inspections. In December 2021, the United States issued 77 subpoenas pursuant to Rule 45 to inspect sites and observe classrooms in 47 facilities housing GNETS programs. It has since conducted site inspections and observed classrooms at 7 of the 47 facilities.² However, unresolved objections to the terms of the Rule 45 subpoenas affecting the remaining facilities have forced the United States to postpone nearly three weeks of planned site inspections.

Mindful of the September 12, 2022 fact discovery cutoff, and after extensive good faith conferences with the objecting non-parties, the United States requested and participated in a telephonic status conference with the Court to clarify the timing and procedure to resolve the ongoing discovery disputes. In accordance with the instructions provided by the Court during the March 2, 2022 conference, the United States filed Joint Discovery statements with two groups of objecting non-parties on

² Attachment A to this Joint Status Report outlines the facilities where the United States has successfully completed site inspections. The United States negotiated site inspections of the 7 facilities referenced above cooperatively but issued subpoenas in advance of the site visits as it did for all facilities scheduled for site inspections after December 2021. The regional GNETS programs and fiscal agents affiliated with those 7 facilities did not lodge objections to the United States' inspection subpoenas.

March 4, 2022. A third non-party requested additional time and is expected to file a joint discovery statement with the United States the week of March 14, 2022.

On March 3, 2022, the day after this Court's status conference, the State's counsel advised by email that its GNETS team will be involved in unrelated matters (including the "Fair Fight" litigation trial and two state and one federal jury trial) from April 11 to May 17, 2022. The State requested that the United States refrain from conducting its GNETS site visits during the five-week period beginning April 11. The State has not explained why the trial precludes its law firm – or representatives from the Attorney General's office – from covering the site visits. Although the United States has given the State notice of its site inspections, the State has not brought an independent expert of its own, and has played only a passive role observing the United States and its experts. The State has taken the position that it does not represent regional GNETS programs or the local school districts that make building space available to those programs, so separate counsel participate in each site visit on behalf of the regional GNETS programs and/or school districts.

Should this Court resolve the site inspection issues raised by the objecting non-parties before April 11, the United States opposes foregoing five weeks of time during which site inspections might otherwise be rescheduled. Doing so would effectively prevent any additional site inspections from occurring during this school

year, which ends in late May. This important case, filed six years ago, alleges discrimination against vulnerable Georgia school children. One delay has followed another, including a several year stay urged by the State. This winter, the United States has already lost nearly four months to the underlying discovery disputes. It is past time for this case to move. Failing to complete the remaining site inspections this semester threatens the September 12, 2022 fact discovery deadline. On this ground, the United States objects to such an extensive interruption in the Court-ordered fact discovery period.

2. Production of Documents and ESI

The United States served requests for production of documents and electronically stored information (“ESI”) on the State in July 2020. The United States and the State then conferred and agreed to narrow electronic search requests to limited terms and custodians. Since that time, the State has responded by producing documents and ESI on a rolling basis.

At the time of the last status report, December 10, 2021, the State had produced approximately 360,000 documents. The United States has not received any additional documents and ESI from the State since that time. The State has promised an additional production of approximately 350,000 documents on April

15, 2022. As the United States receives productions from the State, it will diligently review them and prepare to take depositions, as described in Section 3, below.

3. Depositions

As the United States has had the opportunity to review the State's documents, it has begun to depose key state witnesses, beginning with the deposition of Georgia Department of Behavioral Health and Developmental Disabilities ("DBHDD") employee Danté T. McKay on January 6, 2022. The United States has provided notice of depositions of DBHDD employees Stephanie Pearson and John Quesenberry (March 28, 2022) and Georgia State University/ Center of Excellence for Children's Behavioral Health researcher Dimple Desai (March 29, 2022). The United States has asked the State's counsel, which represents each of these witnesses, to confirm the witnesses' availability and details relating to the location of the depositions. The State has confirmed its attorneys will be able to defend these depositions.

B. Steps Taken by the State of Georgia

The State continues to seek discovery and respond to discovery requests with the goal of meeting the Court's fact discovery deadline.

1. Site Inspections

The State continues to work with the United States to attend the site inspections of the GNETS sites. Subsequent to the December 10, 2021 Joint Status Report [Doc. 126], various site inspections have been postponed due to objections from local school districts' counsel. It is important to note that all of the delay, objections, and other difficulty that the Department of Justice has had in reaching agreement with the local facilities is due in no part to the acts or omissions of the State of Georgia. To the contrary, and because the State does not operate or control the facilities, personnel, and independent counsel representing local education agencies and other local entities, the State has not impeded or otherwise prevented the United States from any proposed discovery in this case.

To date, the State's counsel has been able to attend all tours with the exception of one on March 1, 2022 due to a health emergency. It is the intent of the State to attend all site inspections by the United States in this matter.

The State has worked with the United States in good faith for all site inspections, and has been able to be flexible for their intended site visits. This is despite often short turnaround times for visitations that may be hours away from Atlanta. As the United States mentioned, the majority of the State's legal team will be involved in a trial for the *Fair Fight* litigation from April 11, 2022 through May

17, 2022.³ This is another case in the Northern District of Georgia, which will involve witness responsibilities for each of the Robbins Firm attorneys representing the State in this lawsuit. In addition, other attorneys from the Robbins Firm's 22 firm roster are involved in three other state trials during the *Fair Fight* litigation, and one that commences shortly afterwards, which further hampers the law firm's availability during the time requested by the Department of Justice.

We sent an email to the United States explaining this and requesting in good faith that no school site tours be scheduled during that time period, as we may not have the ability to attend them. However, the United States is objecting to this based, at least in part, on the delay caused by the Department of Justice's inability to reach an agreement with the independent school districts that it seeks to inspect.

It is understandable that there are only two months left in the school year before summer break. However, and in addition to the fact that the State has not caused any delay, the State's incapacity to attend these site visitations could detrimentally impact the State's ability to defend against any evidence obtained at them during trial. This is particularly true given the presence of Justice Department attorneys on the proposed tours. As the State mentioned in the previous Joint Status

³ The specific case is *Fair Fight Action, Inc. et al. v. Raffensperger, et al.*, Civil Action No. 18-cv-5391 (SCJ) (N.D. Ga.).

Report [Doc. 126], the State continues to reserve the right to insist on reaching dates that are mutually agreeable to ensure the State's participation. We hope to reach a compromise regarding this with the United States, without necessitating intervention by the Court.

2. Production of Documents and ESI

To date, the State has produced a total of 358,111 documents and 2,599,032 pages. The State is well underway on its Round 2 production for second-round priority custodians identified by the United States. The estimated total documents to be produced in Round 2 will be roughly equivalent to the previous Round 1 production. The State intends to wrap up review of these documents and produce them in mid-April, 2022.

3. Depositions

The United States took the deposition of DBHDD employee Danté J. McKay on January 6, 2022. Additionally, the State has received notice of depositions for DBHDD employees Stephanie Pearson and John Quesenberry for March 28, 2022, and Georgia State University/ Center of Excellence for Children's Behavioral Health researcher Dimple Desai for March 29, 2022. The State anticipates to be able to attend and defend these depositions, despite the aforementioned trial.

Respectfully submitted this 10th day of March, 2022.

KURT R. ERSKINE
Acting United States Attorney
Northern District of Georgia

AILEEN BELL HUGHES
GA Bar Number: 375505
Assistant United States Attorney
United States Department of Justice
Richard B. Russell Federal Building
75 Ted Turner Dr. SW, Suite 600
Atlanta, GA 30303-3309
(404) 581.6000
aileen.bell.hughes@usdoj.gov

KRISTEN CLARKE
Assistant Attorney General

SHAHEENA A. SIMONS
Chief

RENEE M. WOHLLENHAUS
Deputy Chief
Educational Opportunities Section

KELLY GARDNER
Deputy Chief
Educational Opportunities Section

ANDREA E. HAMILTON
VICTORIA M. LILL
CLAIRE D. CHEVRIER
FRANCES S. COHEN
PATRICK M. HOLKINS
LAURA C. TAYLOE
MICHELLE L. TUCKER

s/ Josh Belinfante
Josh Belinfante
Georgia Bar No. 047399
jbelinfante@robbinsfirm.com
Melanie Johnson
Georgia Bar No. 466756
mjohnson@robbinsfirm.com
Danielle Hernandez
Georgia Bar No. 736830
dhernandez@robbinsfirm.com
Javier Pico Prats
Georgia Bar No. 664717
javier.picoprats@robbinsfirm.com
Robbins Alloy Belinfante Littlefield LLC
500 14th Street NW
Atlanta, GA 30318
Telephone: (678) 701-9381
Facsimile: (404) 856-3255

Alexa R. Ross
Georgia Bar No. 614986
alexaross@icloud.com
AlexaRossLaw, LLC
2657 Danforth Lane
Decatur, GA 30033

Special Assistant Attorneys General
Attorneys for Defendant

Trial Attorneys
United States Department of Justice
Civil Rights Division

/s/ Kelly Gardner Womack

GA Bar Number: 916615

United States Department of Justice
Civil Rights Division

Four Consitution Square

150 M Street, NE

Washington, DC 20002

(202) 598-9603

kelly.gardner@usdoj.gov

Attorneys for Plaintiff

L.R. 7.1(D) CERTIFICATION

I certify that this Joint Status Report has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(C). Specifically, this brief has been prepared using 14-pt Times New Roman Font.

/s/ Kelly Gardner Womack
KELLY GARDNER WOMACK

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of March 2022, I filed the foregoing Joint Status Report with the Clerk of Court using the CM/ECF system, which automatically sent counsel of record e-mail notification of such filing.

/s/ Kelly Gardner Womack
KELLY GARDNER WOMACK